

March 2, 2004

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IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF PUERTO RICO
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McNEIL-PPC., et al.
Plaintiffs,
vs.
MERISANT COMPANY, et al.
Defendant.
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CV. 04-1090 (JAG)

FURTHER PRELIMINARY INJUNCTION

held before the HONORABLE JUDGE JAY A. GARCIA GREGORY
on Tuesday, March 2, 2004, at 10:30 p.m.

FOR THE PLAINTIFFS:

STEVEN ZALEGIN, ESQ.
KARLA SANCHEZ, ESQ.

FOR THE DEFENDANTS:

GREGG F. LOCASCIO, ESQ.
HERIBERTO BURGOS, ESQ.

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Q. What is your current job title at Merisant?
A. I'm vice president and general manager for
Latin America at the present time.Q. Could you explain to me what region and what's
included in Merisant Latin America?A. Yes, of course. It includes Mexico, Central
America, the markets in South America until Argentina,
the Puerto Rican market, and the Caribbean markets.Q. Before becoming vice president and general
manager, what was your role at Merisant?A. I was regional marketing director for Latin
America.Q. What was your responsibilities as marketing
director?A. Well, basically the responsibilities I had as
marketing director for Latin America are the
development of the strategies, as well as
implementation of all the strategies in all of the
markets, which includes identifying opportunities in
each of these markets.Q. What additional responsibilities do you now
have as vice president and general manager?A. It has to do with all the areas like managing
management of sales, marketing, human resources,
finances, manufacture.

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THE COURT: Glad to have you back. So we will
hear your witness now.MR. LOCASCIO: Merisant calls Francisco Javier
Cuervo.

THE COURT: He was sworn in.

COURTROOM DEPUTY: Yes, Your Honor, the first
day.THE COURT: Very well. I remind you you're
under oath.
Thereupon,FRANCISCO JAVIER CUERVO ESCALONA
was called as a witness and, after having been first
duly sworn, was examined and testified through the
Spanish interpreter as follows:

DIRECT EXAMINATION

BY MR. LOCASCIO:

Q. Good afternoon, Mr. Cuervo.

A. Good afternoon.

Q. Please state your full name for the record.

A. Francisco Javier Cuervo-Escalona.

Q. Mr. Cuervo, where do you work?

A. I work for Merisant Latin America and my
headquarters are in Mexico.

Q. How long have you worked for Merisant?

A. 7 years.

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Q. Do your responsibilities as the vice president
and general manager of Merisant for Latin America
include the marketing and sale of the brands SAME and
SAME with sugar here in Puerto Rico?

A. Yes, that's correct.

Q. Let me ask you a little bit about Merisant's
sweetener business. How many sweeteners does Merisant
sell in the markets that you're responsible for?A. We manage more than had 14 brands in Latin
America.Q. Can you tell me what some of those leading
brands are and which markets they are sold in?A. Yes, of course. In the case of Puerto Rico we
have EQUAL, SAME, SAME with sugar; in the case of
Mexico we have can CANDEREL and NUTRASWEET; in the case
of Central America and different countries in South
America we have CHUCKER, SUCARYL, SEMBLE. Those are
some of them.Q. I'm going to go ahead and hand up Exhibits AA,
BB, DD, Y and Z and ask you to take a look at them.

(Exhibits handed to the witness.)

Do you have all five of those, Mr. Cuervo?

A. Yes, that's right.

Q. Could you quickly just walk through which
letter you're looking at and tell me which product that

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1 is?

2 A. This is letter Z. This is the product that is
3 sold in Argentina under the brand SUCARYL.

4 This is letter Y. The product is EQUAL SWEET,
5 and this product is also sold in Argentina.

6 This is AA which is CANDEREL in Mexico.

7 Then we have DD which is another shot of
8 SUCARYL in Argentina, together with the SUCARYL that is
9 sold in Mexico. The one that has the blue stripe is
10 the one from Mexico. And you have the rear of both of
11 them.

12 Lastly, we have BB which is CANDEREL in
13 France.

14 Q. You mentioned a lot of different names a
15 moment ago. How do you determine at Merisant which
16 names to use in which markets for your products?

17 A. It has to do with the history of the market
18 and what one wants to convey to the consumer, because
19 each brand has certain characteristics that are
20 associated to the same. Some brands have premium
21 positioning -- high value and price -- and others have
22 low price and value for your money.

23 Q. How about packaging? Is the packaging for the
24 SAME brand name the same in every country?

25 A. No. SAME is mostly sold in Puerto Rico and

1 A. They are boxes of the regular SAME product.
2 Q. How long has SAME been sold in Puerto Rico?
3 A. For more than ten years.
4 Q. Has SAME been successful in Puerto Rico?
5 A. I would say so. In terms of volume it's the
6 highest volume sold in Puerto Rico, and in terms of
7 packages it does not display any others. And it's a
8 very well recognized brand in the market.

9 Q. I believe you were in the courtroom when
10 McNeil's witness, Ms. Sandler, testified. I believe
11 she referred to SPLENDA in Puerto Rico as the market
12 leader based on dollar share.

13 Is that a term you're familiar with?

14 A. Yes, of course.

15 Q. Can you explain to me how SPLENDA could be the
16 market leader in dollar share, but from what you just
17 said, SAME is the market leader as you measure the
18 market?

19 A. It's basically because it has a higher price.
20 So they obtain more dollars per box sold.

21 Q. In terms of which sells more boxes of product
22 in Puerto Rico, which brand is that?

23 A. SAME.

24 Q. Let me ask you a little more about SAME's
25 brand recognition. Is the SAME name and logo something

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1 the packaging is the one for here.

2 Q. Do you use the identical packaging in every
3 country for your other brands?

4 A. No, not necessarily. There is SUCARYL that is
5 different for different markets. We normally try to
6 make packagings that are for each market because
7 different markets may have different meanings and
8 histories of how they reached that point.

9 Q. How do you determine which packaging to use in
10 a particular country?

11 A. It has to do with what we want to convey to
12 the consumer. The brand needs to convey something.
13 The colorings have meaning. We also take into account
14 the cost to develop packaging so that the machinery
15 that makes different brands will have for example the
16 same format.

17 Q. I think you mentioned this already. Is one of
18 the brands under your supervision is brand name SAME?

19 A. That's right.

20 Q. Let me go ahead and hand you what's previously
21 been marked as Plaintiff Exhibit 3 and Plaintiff
22 Exhibit 11.

23 (Exhibits handed to the witness.)

24 Those two boxes I just handed you, Plaintiff
25 Exhibit 3 and Plaintiff Exhibit 11, what are those?

1 you tested for here in Puerto Rico?

2 A. Yes. We have research concerning the
3 recognition that SAME and logo has. And SAME is one of
4 the most remembered brands in Puerto Rico, most
5 recognized.

6 Q. Let me go ahead and hand you what's marked as
7 Defendant's Exhibit V.

8 (Exhibit handed to the witness.)

9 Have you ever seen Defendants Exhibit V
10 before?

11 A. Yes, that's right. This is a study prepared
12 by a local company that tells us about different
13 attitudes and uses of the product.

14 Q. On the first page after the cover sheet there
15 is a chart that says 'Non-Caloric Sweeteners Unaided
16 Brand Awareness.' Do you see that?

17 A. Yes, of course.

18 Q. Can you tell me what it reflects?

19 A. The name or the term 'unaided brand awareness'
20 means the number of persons who spontaneously will tell
21 you the name of the brand when you ask them about
22 non-caloric sweeteners.

23 And what you can see here through different
24 periods of time, the 3 columns to the right that for
25 example EQUAL has 84 percent, SAME 46, and SPLENDA 47.

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1 Which means that in the case of EQUAL, 84 percent of
 2 the persons interviewed mentioned the brand without any
 3 stimulus based on the brand. It's just simply the
 4 total market.

5 Q. This SAME study, Defendant Exhibit V, has some
 6 other data. If you could turn to page 5, there is a
 7 section called 'Content Recall of SPLENDA Advertising.'
 8 Let me first ask: Was this part of the study that was
 9 created for Merisant?

10 A. Yes, that's right.

11 Q. What does this page reflect?

12 A. Well, persons are asked, first of all, if they
 13 remember having seen any advertisement for any of the
 14 brands. And what we can see here is what every person
 15 remembers from each advertisement.

16 The part above talks about visual recall, and
 17 underneath is the auditory recall.

18 Q. Does this data have any indication as to
 19 whether consumers remember anything about the box
 20 design for SPLENDA after watching commercials?

21 A. It's basically here on the fourth line where
 22 we see 6 percent of the people who responded
 23 spontaneously mention a yellow box as part of SPLENDA's
 24 advertisement.

25 Q. Were there any other references to the box or

1 And the truth is that that's what defines our market.

2 Q. How is SAME positioned in the Puerto Rico
 3 market?

4 A. SAME has the positioning of value for your
 5 money. It's a product that traditionally Puerto Rico
 6 market has offered quality product at a good price.

7 Q. I'm going to go ahead and hand you Exhibits O
 8 and Q.

9 (Exhibits handed to the witness.)

10 Have you seen the boxes depicted in Exhibits O
 11 Q before?

12 A. Yes.

13 Q. In your experience in this market are there
 14 some images that appear on boxes that are commonly used
 15 in the history?

16 A. The most normal thing in packaging for a food
 17 product is to show what's called "the serving
 18 suggestions." And in the case of low caloric
 19 sweeteners the usage is mostly related to coffee. And
 20 that's what you can see the most here.

21 Q. Is there anything else other than coffee cups
 22 that you believe is commonly on packages in this
 23 market?

24 A. Yes. You also have fruit, which in the case
 25 of Puerto Rico market it's an important usage.

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1 the color of SPLENDA's box on this data?

2 A. Yes. The yellow packets, with 3 percent.
 3 There is a yellow house, but at the end there is no
 4 recall. That's basically it.

5 Q. In your experience, the number that showed for
 6 a yellow box says 6 percent. How do you view that in
 7 terms of recognition?

8 A. I believe it's low. The truth is what people
 9 are remembering are the message from Cielito Rosado,
 10 who is the local chef. And that basically deals with
 11 the message that SPLENDA normally conveys, that it's a
 12 product to cook with.

13 Q. Mr. Cuervo, who does the brand SAME compete
 14 with?

15 A. Initially with all low calorie sweeteners
 16 product. But in addition, the market is also formed or
 17 composed by sugar.

18 Why do we say this? We think the great
 19 majority of people in markets in most parts of the
 20 world use sugar to sweeten their drinks. And the main
 21 task in marketing that we have is to convert them into
 22 low-calorie sweeteners.

23 The truth is that when someone is sweetening
 24 their coffee, for example, he has the possibility of
 25 using it with sugar or with low-caloric sweeteners.

1 And in some you see iced tea, which you see
 2 the usage mostly in the United States and not so much
 3 here.

4 Q. How about packets, is that something in your
 5 experience that's common on boxes?

6 A. Yes, of course. Almost everyone has a picture
 7 of the package, because that's what mostly the consumer
 8 manipulates, is the packet.

9 Q. Let me hand you Exhibit U.

10 (Exhibit U handed to the witness.)

11 Can you describe for me what is shown in
 12 Exhibit U?

13 A. Photographs of the racks in a store that I
 14 would consider typical here in Puerto Rico. It's the
 15 Pueblo.

16 And one thing that is important to see here is
 17 that sugar is right next to low-caloric sweeteners,
 18 because the category is defined as something that can
 19 substitute one another. In this case it's sugar plus
 20 low-caloric sweeteners.

21 Q. There are some large bags of sugar for baking.
 22 Is sugar in terms of individual-use packets or cubes
 23 also contained in this area of the store?

24 A. Yes, the DOMINO boxes have packets. Some are
 25 in cubes form. Basically that's it.

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1 Q. As long as you have been responsible or
 2 familiar with the marketplace in Puerto Rico, has
 3 DOMINO been on the shelves in the same area as the
 4 sugar substitutes?

5 A. Yes. In the case of Puerto Rico, that I can
 6 remember, sugar has always been here. And this is
 7 something that we have been proposing to do in other
 8 markets, and that is to put sugar right next to
 9 low-caloric sweeteners.

10 Q. Specifically, have you always seen the brand
 11 DOMINO kept in the same area of the market as the sugar
 12 substitutes?

13 A. Yes.

14 Q. I would like to talk to you a little bit about
 15 the specific SAME product that's at issue in this case.

16 Are you familiar with the brand that's been
 17 called SAME with sugar?

18 A. Yes, of course.

19 Q. There has been some debate as do what this
 20 product is called. When you go to the trade with this
 21 product, what is it called?

22 A. SAME with sugar.

23 Q. Why is it called SAME with sugar?

24 A. Because that's what it is. It's SAME and it
 25 has sugar. And that's what's differentiates it, not

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1 only from regular SAME but from other products in the
 2 market.

3 Q. How is SAME with sugar related to the SAME
 4 brand name that's been in this country, in Puerto Rico,
 5 for more than ten years?

6 A. SAME plus sugar is a line extension that uses
 7 the positioning of value of SAME with a formula that
 8 contains sugar.

9 Q. What do you mean by a "line extension"?

10 A. A line extension in an industry is usually
 11 known as a product that is related but is different
 12 over the same brand. For example, we have
 13 decaffeinated NESCAFE, cappuccino, espresso. All of
 14 those are line extensions of NESCAFE.

15 Q. How did the SAME with sugar line extension
 16 come about?

17 A. One of the things that I identify as part of
 18 my job is to identify opportunities in the market. And
 19 when we saw the market in Puerto Rico, we found that we
 20 had low-caloric sweeteners made with aspartame where we
 21 had premium and value brands.

22 Saccharin is very small in Puerto Rico;
 23 therefore, it does not allow for two different brands
 24 to make an important volume.

25 And we had a series of products related to

1 sugar in which there existed a premium positioning of
 2 high price, which is evidently SPLENDA. And no one
 3 occupied the positioning of a more natural image
 4 related to sugar with a proposal of value for your
 5 money.

6 When we identified that opportunity in the
 7 market with no one occupying that position, that's when
 8 we decided that we could use a line extension of SAME
 9 to offer this to the market.

10 Q. When did you first consider introducing SAME
 11 with sugar to the market in Puerto Rico?

12 A. A year ago.

13 Q. I'm going to hand you what's been marked as
 14 Exhibit W.

15 (Exhibit handed to the witness.)

16 Can you tell me what Defendant Exhibit W is?

17 A. This is the marketing plan that was used to
 18 launch SAME with sugar. And here it has the objective
 19 that we wanted to look for, as well as some tactical
 20 issues concerning how we were going to reach that
 21 place.

22 Q. If you could, you mentioned the goal or the
 23 idea for this brand. Can you go ahead and show me
 24 where in the documents you are referring to?

25 A. In the first paragraph you can read it very

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1 clearly where basically what we say here is that we
 2 want to improve our competitive positioning in Puerto
 3 Rico through the introduction of a line extension on
 4 the SAME with the formula made with sugar.

5 And then what we want to achieve in the mind
 6 of the consumer, which is to have a product with a more
 7 natural image with good value for your money.

8 And that would be basically the objective.

9 Q. If you look at the section called "Marketing
 10 Strategy SAME with sugar," can you explain to me what
 11 the marketing strategy was for this brand, SAME with
 12 sugar?

13 A. Basically what we are saying here is that we
 14 want to position SAME with sugar, vis-a-vis, called the
 15 products that have a relationship with sugar, with the
 16 differentiation that we have a much value for money.

17 Q. And then the next the paragraph there is a
 18 reference to brand positioning. Can you explain that
 19 for me?

20 A. Here what we have is a differentiation that we
 21 want to obtain. What we want to achieve in the mind of
 22 the consumer is that SAME with sugar is a product made
 23 with sugar and that it costs less than the others.

24 And the secondary part that is not there is
 25 that we don't come from sugar, but we are made with

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1 sugar. That's part the differentiation in our brand.

2 Q. Can you explain to me what you mean when you
3 say "with sugar" as opposed to "made from sugar"?

4 A. Yes, the formula of our product contains
5 sugar. We don't have an ingredient that has gone
6 through a determined process that originally was sugar
7 and ended up being something else later; but rather
8 that our product contains 97 percent sugar, and you can
9 see that in our list of ingredients, that we contain
10 sugar.

11 Q. I believe you were in the courtroom when
12 McNeil's lawyer said that the fact that there is sugar
13 inside SAME with sugar doesn't really make any
14 difference. Is that true?

15 A. Not really. It has two effects. It has the
16 cost implication, because sugar is cheaper than other
17 products that are used as fillers in the product.

18 But this is not something that they would
19 really know, because this is not true for the United
20 States, but it's true for other countries. In the
21 United States sugar is more expensive.

22 And since the product is made in Argentina, it
23 turns out to be cheaper to do it in Argentina.

24 The second point is the image that this causes
25 in the consumer. It's an image of more naturalness and

1 other products.

2 If we wanted a consumer to repeat to us after
3 he had seen a commercial what he had seen, we would
4 like him to say that.

5 Q. When SAME with sugar was launched, were you
6 trying to compete with SPLENDA?

7 A. Yes, of course. SPLENDA is a strong
8 competitor in the area and one that has been able to
9 attain this association of sugar with sweeteners.

10 Q. At the bottom of Exhibit X, the creative
11 strategy, there is a reference to desired consumer
12 response. Do you see that?

13 A. Uh-huh (positive response.)

14 Q. Can you tell me what that means?

15 A. It's an estimate that we made of the possible
16 sources of business for us. We estimated that 15
17 percent of the our regular SAME consumers were going to
18 switch: 60 percent could come from SPLENDA consumers;
19 20 percent could be new users to the category; and 5
20 percent distributed among all.

21 I want to say that evidently these are only
22 estimates. There is no scientific base to say that
23 that's the way it is but rather the way we think it
24 might be.

25 Q. I notice that one of those groups was SPLENDA

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1 being closer to sugar.

2 Something that's very peculiar about this
3 market is that even though people want to substitute
4 sugar, they really don't want to lose sugar. They feel
5 that it's a loss.

6 Somehow this helps us add something that is a
7 lot more natural.

8 Q. I'll go ahead and hand you Exhibit X. Can you
9 tell me what that is?

10 (Exhibit handed to the witness.)

11 A. This document is the one that's normally given
12 to the advertising agency for them to produce the
13 communication with the product.

14 Q. Does Exhibit X, the creative brief, come
15 before or after Exhibit W, the one we just looked at
16 that was the market brief?

17 A. First comes the marketing plan and then the
18 creative brief.

19 Q. This document, Exhibit X, does it also talk
20 about the strategy for marketing for SAME with sugar?

21 A. Yes, it mentions the communication strategy
22 which is an essential part of marketing. And in this
23 case the key part that should be communicated to the
24 consumer is the basic benefit, and that is that SAME
25 with sugar is made with sugar and it costs less than

1 users. Was there a plan when you designed the product
2 SAME with sugar or the package to confuse or mislead
3 SPLENDA users?

4 A. No, not at all. We have nothing here that
5 says that we want to confuse SPLENDA consumers. But,
6 also, we have no communication piece that goes directly to
7 SPLENDA with that intention.

8 Q. In the market that you view as consumers who
9 seek a more natural sugar substitute or a sugar-based
10 sugar substitute, is SPLENDA your most significant
11 competitor?

12 A. I will say, yes, that it's the most important
13 competitor concerning low-caloric sweeteners related
14 with sugar; however, we must note that DOMINO will be
15 our main target to attack. It's not in our segment,
16 but it's part of the larger market.

17 Q. When you talk about DOMINO, are you suggesting
18 to switch people into the sugar substitute market?

19 A. Yes, of course.

20 Q. How has SAME with sugar been received here in
21 Puerto Rico?

22 A. Well, the indications that we get from our
23 distributor or our distributors is that it has been
24 very well received. Something that must be emphasized
25 is that the distribution was able to be done by 75 to

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1 80 percent during a very complicated period, which is
 2 December. The only big chain that did not approve the
 3 product was Pueblo.

4 Q. Why was that?

5 A. Pueblo's process is a lot more complicated.
 6 The product was approved, but then from there it has to
 7 go to committee, and from there it has to go to
 8 planning committee. Basically, the product had been
 9 approved, but all the steps had not been fulfilled in
 10 order for the product to reach the store.

11 Q. Were you in the courtroom on the first day, I
 12 believe it was a witness named Ms. Fontes testified
 13 that she had gone to a Pueblo and bought SAME with
 14 sugar by mistake?

15 A. Yes, I was here.

16 Q. From what you said about Pueblo, would that
 17 have been possible for her to have bought SAME with
 18 sugar at Pueblo during any time prior to her coming to
 19 testify?

20 A. The truth is that it would have been very
 21 difficult for her to have bought it, and I would say
 22 impossible.

23 One of the things we did was that we reviewed
 24 all the invoices of our distributor to see whether that
 25 store had received a product. And it did not.

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1 We sent a sales supervisor to the store to ask
 2 whether they had received the product, and they had
 3 never received it.

4 In addition, the shelves were reviewed to see
 5 whether there was product, and there was none. So it
 6 would have been very difficult.

7 Q. Let me hand you what's been marked as
 8 Plaintiff Exhibit SS.

9 (Exhibit handed to the witness.)
 10 Is Defendant Exhibit SS the photographs of the
 11 Pueblo in El Senorial?

12 A. Yes, that's the photograph of El Senorial, a
 13 Pueblo where we asked our sales personnel to take for
 14 us.

15 Q. There looked like there are some spots on the
 16 shelves that the product is all sold out of.

17 Did you look into or talk to your personnel to
 18 see if those were SAME with sugar and is it all sold
 19 out, or SAME with sugar had never been there?

20 A. In addition, it's very difficult that it would
 21 have been SAME with sugar, because it should have a
 22 label saying SAME with sugar had the product been
 23 approved. But they didn't receive it, there were no
 24 invoices, and there was no product in the store.

25 Q. Can you tell me why SAME with sugar is

1 packaged differently from the regular SAME which has
 2 just aspartame in it?

3 A. Several things. First, in terms of the
 4 orientation and the format, it's the same orientation
 5 and format that we have with SUCARYL in Argentina. And
 6 as I explained earlier, this is due to the machinery
 7 that is used. That's in terms of the format.

8 Now, in terms of the general design, we needed
 9 to make a product that was significantly different from
 10 the regular product, yet at the same time would
 11 communicate the brand, an important matter, and had a
 12 color that was associated with sugar in Puerto Rico.

13 And that's how in general terms one gets to
 14 the package.

15 Q. You mentioned that the orientation of the
 16 package for SAME with sugar was different than regular
 17 SAME.

18 A. Yes, the orientation and the size.

19 Q. Can you explain why SAME with sugar is what
 20 I'll call "horizontal" versus vertical, like the
 21 regular SAME?

22 A. This is a way to differentiate the brands.
 23 But it also has to do with the size of the packaging
 24 and the machinery that is used in Argentina, which is
 25 different than the machinery that is used in the United

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1 States.

2 Q. Am I correct that regular SAME is manufactured
 3 somewhere other than where SAME with sugar is
 4 manufactured?

5 A. Yes, that's correct. This is Manteno, Illinois.
 6 And SAME with sugar is in Sarate.

7 Q. I'll hand you two exhibits: Defendant Exhibit
 8 HH and Defendants Exhibit II.

9 Have you ever seen Defendant's Exhibit HH
 10 before?

11 A. Yes.

12 Q. What is that?

13 A. Representation to the sales force.

14 Q. What event was going on that this presentation
 15 was put together for?

16 A. It's basically a presentation to the sales
 17 force to present the product, to talk about this main
 18 characteristic, and some technical information such as
 19 the size; the number of product per pallets.

20 But basically a representation to the sales
 21 force to show the qualities of the product.

22 Q. On the first slide there is some language at
 23 the bottom. Can you tell me what that slogan is in
 24 quotes?

25 A. Quality at good price.

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1 Q. Is that the slogan or theme for SAME with
2 sugar?

3 A. In the launching the sales force it was.

4 Q. Can you tell me what Exhibit II is?

5 A. It's a presentation made by the business
6 manager here in Puerto Rico where he mentions data
7 concerning the performance of the brand.

8 Q. What does it indicate about the launch for
9 SAME with sugar?

10 A. One of the things that it talks about is the
11 75 to 80 percent distribution; the amount of money that
12 had been invoiced during December; and that this has
13 been a success, basically. It also mentions that the
14 feedback from consumers and clients has been very
15 positive.

16 Q. There is a page that says "SAME with sugar
17 Launch" on top. Do you see that?

18 A. Yes.

19 Q. Can you tell me what the last bullet means?
20 It says trade was expecting a strong respond of
21 Merisant to the competitor threat. Well, it says
22 "treat."

23 Can you tell me what that means?

24 A. Basically, the feedback that we were getting
25 from the clients was that this product could be a huge

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1 success in Puerto Rico and that they expected SPLENDIA
2 to respond very aggressively, vis-a-vis, this
3 launching.

4 I think one of the things that happens here,
5 one of the things that normally happens here is when
6 you have a product that doesn't have a direct
7 competitor, the promotional dynamic in the trade, that
8 is, the offers made have a lower level than if the
9 product has strong competition.

10 And one of the things that the trade was
11 expecting was an increase in that category because of
12 our presence. And that's practically what it talks
13 about here concerning the feedback of the trade.

14 Q. When you decided to launch SAME with sugar,
15 couldn't you have just kept the blue box that regular
16 SAME comes in?

17 A. No. We needed to differentiate ourselves, and
18 we needed to relate ourselves more closely to sugar.
19 That's part of the full communication package that we
20 have to convey.

21 Q. Would there be any other concerns about
22 packaging SAME with sugar in a blue box?

23 A. Yes, other than it would be a lot more
24 difficult to differentiate it from regular SAME.

25 But it would have also forced us to have spent

1 a lot more money to convey that the product has sugar.
2 And that would obviously go against the strategy of
3 offering a product with a better value.

4 Packaging is one of the primary ways of
5 communication. It's not just something to contain
6 something inside of. Basically, it helps us convey the
7 that the product has the positioning of more value for
8 your money and that it's closer to sugar.

9 Q. When you thought about launching SAME with
10 sugar, did you think about coming up with a new name or
11 using a different name than SAME for the product?

12 A. Yes, although that wouldn't have made any
13 sense. If you remember what our objective was, was to
14 appropriate ourselves or have a wider participation in
15 a segment that has a value property proposal with a
16 more natural image. We have the natural image with the
17 formula, and the value image, we have it with the
18 brand.

19 To have launched it with a different name
20 would have made it more difficult to launch the value
21 proposal.

22 Q. I handed you earlier an Exhibit DD, which I
23 have just put on the screen, also. Was there ever any
24 consideration of using the name SUCARYL for the new
25 product that became SAME with sugar?

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1 correct?

2 A. Yes.

3 Q. So why would you not want to use a blue box?

4 A. Because what we wanted to convey was the new
5 formula that contains sugar as opposed to the regular
6 SAME formula that contains no sugar.

7 Q. So how did you finally decide on what the SAME
8 with sugar packaging would look like?

9 A. Basically, this has to do with our wanting to
10 communicate from the package the positioning of the
11 product, which is a product that contains sugar and
12 it's a product that has a value proposal.

13 Basically, that's the way that we reached the
14 packaging.

15 Q. Did you think any particular color assisted in
16 sending that message?

17 A. Yes, yellow. Yellow: You have SPLENDA that
18 is associated with sugar; you have SUGAR TWIN that even
19 though it's a formula with saccharin, the name is self
20 explanatory; and you have DOMINO, which is the
21 predominant market in sugar packets in yellow.

22 Q. With regard to DOMINO, the box is yellow or
23 the packets are yellow?

24 A. The box is yellow.

25 Q. You mentioned before that the market here in

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1 Puerto Rico wasn't as popular a place for saccharin
2 manufacturers.

3 Is SUGAR TWIN a saccharin brand?

4 A. Yes, it's a saccharin brand.

5 Q. Do you know] if it's sold here in Puerto Rico?

6 A. Yes.

7 Q. Let me go and hand you Exhibit CC.

8 (Document handed to the witness.)

9 Have you ever seen Exhibit CC before?

10 A. Yes, that's right.

11 Q. Can you tell me what it is?

12 A. When we were thinking of redesigning SUCARYL
13 in Argentina, this is one of the options that we
14 reviewed at the moment. But it didn't come out into
15 the market.

16 Q. Does Merisant use the SAME designers for its
17 packages for the Argentina market as it does for the
18 Puerto Rican market?

19 A. Yes.

20 Q. At the time you looked at creating the SUCARYL
21 product in the yellow package, were you aware that
22 SPLENDA was in yellow packaging?

23 A. Yes. This was made about three years ago,
24 something like that. But, yes, SPLENDA already
25 existed.

1 Q. I notice that the package I just showed you,
2 Exhibit CC, is a different color than the yellow used
3 on SAME with sugar.

4 Can you explain to me why the color was used
5 differently when SAME with sugar was launched here in
6 Puerto Rico?

7 A. This is a design proposal that they made.
8 Basically, it didn't come out into the market, but it
9 was one of the colors that we considered.

10 Q. I'll go ahead and hand up to you two exhibits,
11 Exhibit I and Exhibit J.

12 (Exhibits handed to the witness.)

13 Can you tell me what Exhibit I and Exhibit J
14 are?

15 A. Yes. These are two photographs for packaging
16 for SPLENDA and SAME, together with a color guide
17 called "Pantone." And this color guide is something
18 that is used normally in the industry to make reference
19 to specific color and avoid the subjectivity when
20 talking about a yellow or a red color.

21 Q. And what on the Pantone references on Exhibit
22 I and Exhibit J indicate about the colors of the SAME
23 with sugar package and the SPLENDA package?

24 A. It indicates that they are different. SPLENDA
25 is closer to 100U, while ours is closer to 607.

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1 A. Yes, it's the same. Likewise as the fruit and
2 the orange juice.

3 Q. I noticed on the SUCARYL box the letters are
4 just in solid blue on the light blue box. And on the
5 SAME with sugar box the letters change colors from
6 light blue to dark.

7 A. Uh-huh.

8 Q. Do you know why that was done?

9 A. Yes. Basically, what we wanted to do was we
10 have the logo in SAME that is two colored, but it's a
11 logo that is quite old, to put it that way.

12 So what we did was we kept the SAME font and
13 then managed a two-color version that would be more
14 modern than this one here.

15 Q. Have you seen any other products in the
16 marketplace that have done a similar thing where you
17 use a logo that changes colors to make it look more
18 modern?

19 A. Yes. In the food market you can see a number
20 of products that have a degrading of the color.

21 Q. Do you understand that McNeil in this case is
22 asking the Court to stop MERISANT from producing SAME
23 with sugar in this box?

24 A. Yes.

25 Q. If Merisant is required to stop selling or

1 And lastly but not least important, the damage
2 done to the consumer that today would have the product
3 at a better price and that would simply stop having it
4 as an option.

5 Basically that would be it.

6 Q. If Merisant was told they had to come up with
7 a new package, how long would that take?

8 A. Depending on the inventories that exist at the
9 present time and what has been already ordered, it
10 would be about six to eight months.

11 Q. That would be the time from starting the
12 process to when it would appear to consumers?

13 A. Exactly.

14 To clarify, to explain why such a long period
15 of time, it takes 30 days for the product to come from
16 Argentina to Puerto Rico. So there, you have just one
17 month there.

18 Q. I'll go ahead and hand you two or three
19 things, Exhibits BB and CC, and Exhibits EE and M.

20 (Exhibits handed to the witness.)

21 First off I've given you BB and CC. Have you
22 ever seen those before?

23 A. Yes. NUTRASWEET is a brand of ours, and
24 NATRATASTE is Cumberlands.

25 Q. Is Cumberland the folks that make SWEET'N LOW?

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1 marketing SAME with sugar, what will happen?

2 A. We have identified direct costs associated
3 close to a million dollars between the inventory that
4 we have, the inventory that our distributors have, that
5 the trade has in the stores.

6 We also have identified raw product such as
7 boxes that we have already made that will enter into
8 this, that will enter into this million dollars.

9 Nevertheless, something that is not easy to
10 quantify at this moment will be the damage caused to
11 the brand itself, because the consumers wouldn't know
12 if there was something wrong with the product or what
13 had happened.

14 We would also have damage of the relationship
15 between our distributors and the trade.

16 We would have the damage of our relationship
17 between us and the distributor.

18 There is an element that is difficult to
19 quantify, but we have contracted with several shoppers,
20 which are the newspapers in the stores that advertise
21 sales. And if for some reason the Department of
22 Consumers Affairs sees that the product that is being
23 advertised is not there, it can put a fine of up to
24 \$10,000 per store, that in Pueblo alone would be
25 half-a-million-dollar fine.

1 A. Yes.

2 Q. And then I handed you Exhibit M. Can you tell
3 me what that is?

4 A. These are the products that are related to
5 sugar in the shelf: SPLENDA, SUGAR TWIN, DOMINO, and
6 SAME with sugar. And in all of them the predominant
7 color is yellow.

8 Q. I have two other things. Exhibit N is a side
9 view of the same boxes. And I'll hand that up to you.
10 And then Exhibit GG.

11 (Exhibits handed to the witness.)

12 Can you tell me what Exhibit N is?

13 A. The same boxes but from the sideways view.
14 And you also see different yellows.

15 Q. Can you tell me what Exhibit GG is?

16 A. It's a drawing of the packet used in SAME with
17 sugar.

18 Q. The last thing I hand you is Exhibit EE.

19 You mentioned earlier that the photos from the
20 SUCARYL box were used as they all were for the SAME
21 with sugar package. Can you tell me what is the
22 photograph I just handed you?

23 A. This is the photograph for SUCARYL.

24 Q. Mr. Cuervo, if the Court was to enjoin
25 Merisant from selling SAME with sugar in this package

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1 and it was later determined that that injunction should
 2 not have been granted, what do you think that would do
 3 to the SAME with sugar brand?

4 Do you want me to ask it again?
 5 THE INTERPRETER: Yes, please.

6 Q. If the Court ordered that SAME with sugar
 7 could not be sold in this package and then it later
 8 determined that it should not have done that and the
 9 product could then be sold again in this box, what
 10 would the impact be on the brand for you?

11 A. As I said, it would be very difficult for the
 12 consumers to accept the product once again because it
 13 would have like the mark of a product that came and
 14 then left.

15 But one of the rationales that you have for
 16 having a product at a good price is precisely to have a
 17 good cost, a low cost. And I think that's one of the
 18 competitive advantages that we have, to run before the
 19 cost of destruction and then collecting, et cetera, et
 20 cetera, et cetera, would probably kill this project for
 21 many years.

22 MR. LOCASCIO: I have no further questions at
 23 this time, Your Honor.

24 THE COURT: We'll take a short recess and
 25 we'll be back in ten minutes.

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1 (Break.)

2 THE COURT: I remind the witness he is under
 3 oath.

4 MS. SANCHEZ: Good afternoon, Your Honor.

5 CROSS EXAMINATION

6 BY MS. SANCHEZ:

7 Q. Good afternoon, Mr. Cuervo.

8 A. Hello. Good afternoon.

9 Q. If you could take out Exhibit V that Mr.
 10 Locascio showed you. It's your Omnitrack.

11 Do you have that?

12 A. Got it.

13 Q. If you will recall on the second page, which
 14 has the number 1 at the bottom. You were asked some
 15 questions about the unaided responses?

16 A. Uh-huh (positive response).

17 Q. I need responses over here on the right. Do
 18 you see that?

19 A. Yes.

20 Q. What is "Top of Mind"?

21 A. Top of Mind is the first mention made when you
 22 ask the people who are answering the questionnaire if
 23 they can name brands of non-caloric sweeteners. The
 24 first one is the top of mind.

25 Q. In that category of March of 2003, SPLENDA

1 scored 16 percent; correct?

2 A. That's right.

3 Q. And SAME scored 13; correct?

4 A. Yes.

5 Q. And then the total unaided you asked in
 6 another question and say 'what other brands are there'?

7 A. No, the unaided total, what it tells you is
 8 the total of mentions, the first one and then several.

9 Q. And for that there was 47 percent, I think you
 10 testified.

11 A. Yes.

12 Q. And 46 for SAME; correct?

13 A. Uh-huh (positive response.)

14 Q. And both the SPLENDA numbers are a little bit
 15 higher than the SAME numbers. Not by much.

16 A. Yeah.

17 Q. Now, you know that in March of 2003 SPLENDA
 18 wasn't even on the market for three years; correct?

19 A. I'm sorry.

20 Q. You know that in March of 2003, SPLENDA hadn't
 21 been on the market for three years. Is that correct?

22 A. Yes.

23 Q. But SAME had been on the market for almost ten
 24 years; correct?

25 A. Yes.

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1 Q. By the way, SUGAR TWIN is not listed here, is
 2 it?

3 A. No.

4 Q. You also gave some testimony about -- let's go
 5 to page 5. And these were the content recalls for
 6 SPLENDA; correct?

7 A. Yes.

8 Q. And you talked about some of the people
 9 mentioned the yellow box and the yellow packets;
 10 correct?

11 A. That's right.

12 Q. If you go back to the EQUAL content recall --
 13 A. Uh-huh.

14 Q. -- which is on page 3.

15 A. Yes.

16 Q. Nobody mentions the blue boxes or blue
 17 packages. Is that right?

18 A. No. It only says that the box of EQUAL was
 19 shown, 2 percent.

20 Q. I see that it says that. But my question was:
 21 No one mentioned the blue box or the blue packets.
 22 Isn't that right?

23 A. Yes.

24 Q. You could put it that away.

25 Now, you told us a number of things about your

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1 new SAME product; correct?

2 A. Correct.

3 Q. And let me ask you: Were you involved in
4 designing the trade dress for the yellow SAME?

5 A. Yes, I was involved.

6 Q. Can you tell me how?

7 A. I was supervising the development which
8 involved supervising several people, both here as well
9 as in Argentina.

10 Q. Were you involved in making the decisions
11 about how the SAME package with look?

12 A. Yes, that's right.

13 Q. Did you approve the packaging?

14 A. Yes.

15 Q. Did Merisant in the United States approve the
16 packaging?

17 A. No. We showed it to them, but not necessarily
18 for approval.

19 Q. So there was no formal approval from Merisant
20 U.S.

21 A. No, no formal approval from them.

22 Q. Now, you showed them the variety of other
23 pictures of other products that you had and that you
24 sell in Latin America; correct?

25 A. Yes.

1 package; correct?

2 A. Yes.

3 Q. So you could have made this package and just
4 put the name SAME on your yellow SAME; correct?

5 A. I believe this was one of the options that we
6 had. However, one of the problems that this packaging
7 has and in general, SUCARYL in blue, is that it's not
8 well balanced. It has many elements on the right-hand
9 side and few on the left-hand side. And that's why we
10 decided not to use this one specifically.

11 Q. Your blue SAME product, the pictures are
12 centered; correct?

13 A. Yes.

14 Q. Now, for your new SAME product, you used the
15 SAME brand name, SAME?

16 A. The SAME brand name, yes.

17 Q. And you did that because SAME has been in the
18 market for ten years; correct?

19 A. Yes, we used it, because as I explained
20 earlier, we need to convey the idea that we have a
21 product with sugar that has a portion of value.

22 Q. SAME had good will in the Puerto Rican market;
23 correct?

24 A. That's right.

25 Q. That same good will came from being in the

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1 Q. And those packages like the blue CANDEREL, and
2 EQUAL SWEET, they are sold in other countries, not
3 Puerto Rico; correct?

4 A. That's right.

5 Q. And you also talked about this yellow package,
6 Defendant's Exhibit CC. Do you remember that?

7 A. Yes.

8 Q. And you said this was designed for use in
9 Argentina?

10 A. Yes, it was one of the options that we sold
11 for Argentina, options..

12 Q. But you said you never used it.

13 A. Not this one.

14 Q. Now, you know that SPLENDA is not marketed in
15 Argentina; correct?

16 A. SPLENDA is sold in Argentina, although it has
17 a small share.

18 Q. Right now it's still sold in Argentina?

19 A. To my recollection, yes.

20 Q. Now, SUCARYL, this product, whatever you're
21 going to use it for, doesn't have sugar in it, does it?

22 A. Not this one.

23 Q. It has saccharin; right?

24 A. Yes.

25 Q. And you had the machinery to make this

1 market for ten years, in part, at least; correct?

2 A. That has a positioning like the image that is
3 tied into value for your money.

4 Q. And, in fact, it's the market leader in
5 volume, you said, in Puerto Rico; correct?

6 A. That's right.

7 Q. But other than the font and the four letters
8 S-A-M-E, Merisant used nothing from this box in its
9 design for its new yellow box; correct.

10 A. The font.

11 Q. I said the font. Let me try again.

12 Other than the font and the four letters
13 S-A-M-E, Merisant used nothing from the blue SAME box
14 in designing its yellow SAME box. Isn't that correct?

15 A. No, because the brand name is predominantly
16 placed in the new packaging. We felt it was enough to
17 transmit that value of property, let's say.

18 Q. Let's me see if I can modify any question with
19 your answer.

20 Other than placing the SAME name in the center
21 of the box using the font and the letters S-A-M-E, you
22 used nothing from this box when designing the yellow
23 SAME box. Isn't that right?

24 A. No, no, we didn't use any element.

25 Q. You didn't use the, I call it the "iced blue

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1 and white colors" in the name, did you?

2 A. We didn't use it because we wanted something
3 more modern.

4 Q. But it was just a yes or no question, if you
5 used this. And anybody can see, you didn't use iced
6 blue and white in your yellow SAME. Isn't that right?

7 A. That's right. We used the same font with the
8 degradation.

9 Q. That's not what I'm asking you. I'm asking
10 you if in the yellow SAME box the colors of the letters
11 S-A-M-E are the same as the colors of the letters in
12 the blue SAME box.

13 A. No, they are not the same.

14 Q. And in your yellow SAME box you didn't use
15 this little title now try; correct?

16 A. Yes, of course.

17 Q. And you didn't use this, I call it a tag of
18 some sort that informs the consumer how many packets;
19 correct?

20 A. That's right, because it's put at the bottom.

21 Q. It's not put in the bottom like this, is it?

22 A. Yes.

23 Q. It's not here in the center; correct?

24 A. No, it's not in the center. It's below.

25 Q. And you didn't use this coffee cup; correct?

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1 A. That's right.

2 Q. This coffee cup has a blue rim -- correct --
3 and this one is just white?

4 A. That's right.

5 Q. You didn't use the spoon; right?

6 A. That's right.

7 Q. You didn't use the bowl of cereal on the other
8 side of the box, did you?

9 A. That's right.

10 Q. You didn't use different pictures on either
11 side of the box; correct?

12 A. That's right.

13 Q. You didn't use the SAME shape.

14 A. That's right.

15 Q. Even though they both weigh 80 grams, you
16 changed the shape and the size; correct?

17 A. Yes, it's a different machinery that makes
18 them, but yes.

19 Q. You have the machinery that makes this;
20 correct?

21 A. That's right.

22 Q. So you completely redesigned the package for
23 the yellow SAME.

24 A. Yes.

25 Q. And I think you said on your direct that one

1 of the reasons you did that was because, otherwise, it
2 would be difficult to connect a blue package to the
3 idea of sugar.

4 A. Yes. Blue packaging, at least in the Puerto
5 Rico market, are not associated with sweeteners that
6 contain sugar.

7 Q. You know that in Puerto Rico that sugar mostly
8 comes in either white packets or white and blue
9 packets; right?

10 A. When they are in bulk, yes.

11 Q. And I was showing the witness Plaintiff
12 Exhibit 52 and 54.

13 And you didn't make your box white or white
14 and blue; correct?

15 A. Yes, that's right.

16 Q. Now, sugar packets, also, sugar in bags like
17 this, they don't have coffee cups on the front, do
18 they?

19 A. Yes. No, they don't have it.

20 Q. They don't have those packets on the front.

21 A. No, because they don't have packets.

22 Q. They don't have pictures of fruit; correct?

23 A. No, they don't

24 Q. Pictures of orange juice; right?

25 A. No.

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1 Q. The reason why you used these pictures in the
2 SAME wasn't to try and connect it to sugar; correct?

3 A. The reason why we show those photos was to
4 show serving suggestions.

5 Q. And so you didn't use them in order to try and
6 communicate that this package had something to do with
7 sugar; right?

8 A. Yellow is to convey the connection with sugar.

9 Q. And I promise you we'll get to that. But
10 first I'd like an answer to my question which was: You
11 didn't pick these pictures in order to try and
12 associate yellow SAME with sugar; correct?

13 A. No. Those are serving suggestions.

14 Q. Now, you also said that -- I think you
15 mentioned a little while ago as well that selling this
16 yellow SAME in a blue packet would have been difficult
17 because blue communicates aspartame.

18 A. Yes. Most of the products that contain
19 aspartame in the Puerto Rico market are blue.

20 Q. And SAME contains aspartame, too; right?

21 A. That's right, and sugar.

22 Q. And even though it contains aspartame, it
23 doesn't come in a blue box; right?

24 A. Yes, because what we needed to convey here was
25 the association with sugar, not the fact that it has

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1 aspartame.

2 Q. Well, the fact that it has sugar, that's not
3 what gives it its sweet taste; is that correct?

4 A. That's right.

5 Q. It's the sugar that makes it taste sweet, not
6 the aspartame?

7 A. What makes it be sweet is the combination of
8 the two sweeteners that it contains, that is aspartame
9 and acesulfame.

10 Q. Okay. I think I got confused.

11 The two things that make it taste sweet are
12 ace-K and aspartame?

13 A. Yes.

14 Q. Not sugar; right?

15 A. 97 percent, yes.

16 Q. 97 percent of the sweetness comes from sugar?

17 A. No, 97 percent of the sweetness comes from
18 high-powered sweeteners which are aspartame and ace-K.

19 Q. So it's your testimony that 90 percent of the
20 sweetness comes from aspartame and ace-k, and 3 percent
21 of the sweetness comes from the sugar.

22 A. That's right.

23 Q. You also said on your direct, I think, that
24 the sugar is actually used as a "filler," you called
25 it.

1 easily than with the other.

2 Q. Are you marketing your yellow SAME product as
3 something that can be used in baking?

4 A. It's not our principal focus.

5 Q. Is it your focus at all?

6 A. No.

7 Q. Isn't it fair to say that the reason why you
8 included sugar as a filler was so that you can make the
9 claim 'made with sugar'?

10 A. One is the cost, as I mentioned, because sugar
11 is cheaper than dextrose and maltodextrin. And the
12 other one was to have the more natural image.

13 Q. I'm sorry. Isn't the reason why you -- or at
14 least one of the reasons why you put "made with
15 sugar" --

16 A. One was, as I was saying, cost; and the other
17 one is to be able to have the more natural image tied
18 into sugar.

19 Q. Because you wanted consumers to think your
20 yellow SAME product was more natural.

21 A. That's one of the objectives that we perceived
22 and we pursued.

23 Q. Let me just ask you a question: Did you say a
24 little while ago that EQUAL did not have ace-K in it?

25 A. No, EQUAL has ace-K. What I was saying was

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1 A. Yes, that's right.

2 Q. And when marketing no-calorie sweeteners, you
3 use fillers, not for taste; correct?

4 A. They have the function of carrying the
5 product; otherwise, the portion of sweeteners in the
6 packet would be so small that it wouldn't leave the
7 packet, let's put it that way.

8 Q. That's why you called it a "filler." Right?

9 A. Right.

10 Q. That's basically the function of the sugar,
11 like you said on your direct, is to act as a filler.

12 A. That's right.

13 Q. And you said that 97 percent of the sweetening
14 comes from aspartame, you said, and ace-k; right?

15 A. That's right.

16 Q. And that's just like EQUAL; right?

17 A. In the case of EQUAL, yes, that's right.

18 Q. And like blue SAME; right?

19 A. Like blue SAME, yes, also.

20 Q. Just because SAME with sugar has sugar in it,
21 that doesn't mean you can bake with it, does it?

22 A. No, you can bake better than the previous
23 versions of EQUAL and SAME, because in the past it was
24 100 percent aspartame, why now it's aspartame and
25 ace-k. So this new product, one can cook with it more

1 that the previous EQUAL was 100 percent aspartame and
2 that this product that has ace-k and aspartame can be
3 cooked better than the other one.

4 In the United States EQUAL is 100 percent
5 aspartame, just for your knowledge.

6 Q. Okay. So you said a little while ago that the
7 reason or the way that you would connect your yellow
8 SAME product to sugar was to use the color yellow;
9 right?

10 A. Uh-huh (positive response.)

11 Q. Could you answer orally?

12 A. Yes.

13 Q. So if that was what would connect it to sugar,
14 why not just take the blue SAME box and make it yellow?

15 A. That could have been an option. But one of
16 the things we wanted to do was be a bit more modern.

17 Q. Are you now designing your blue SAME box to
18 make it more modern?

19 A. No. In the case of regular SAME, we want to
20 maintain the legacy that the brand has.

21 Q. Wouldn't you want to maintain that SAME legacy
22 by just using the blue SAME and making it yellow?

23 A. The truth is that this is a point and we will
24 have to make a balance. What we want to convey with
25 SAME is value for your money within a new formula in

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1 the market.

2 Q. Were you designing your yellow SAME package to
3 try and get as close as you could to the SPLENDA
4 package?

5 A. No.

6 Q. Are you here to testify that the fact that
7 they look alike is based only on coincidence?

8 A. The fact that they look alike is that we use
9 the brand SAME to convey value and the yellow color to
10 tie it in with other products that have sugar.

11 Q. So if I understand you correctly, the only
12 thing that you think looks similar between these two
13 packages is the yellow color.

14 A. There are two different yellows. But really
15 the cup is different; one has fruit, the other doesn't;
16 one has orange juice, and I believe the other one iced
17 tea.

18 Q. So then the answer to my question would be
19 yes.

20 A. Yes.

21 MR. LOCASCIO: Objection. I don't know what
22 the question is, but I'm not sure the answer is yes.

23 MS. SANCHEZ: I would assume if the witness
24 answered yes, he must have agreed with the question.

25 Would you like me to ask it again to make

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1 like this. Isn't that right?

2 A. That's right.

3 Q. And the way that the yellow SAME package is
4 gradated from light blue to dark blue is just like the
5 way that the SPLENDA letters are gradated from light blue
6 to dark blue. Isn't that right?

7 A. Like many other products in the food market.

8 Q. And I will get back to that in a minute.

9 But the yellow SAME is gradated the same way as
10 SPLENDA. Isn't that correct.

11 A. The truth is that I would have to see them up
12 close in order to see if it's the same.

13 Q. Oh, sure. I thought by now you would have
14 looked at these things like crazy.

15 (Boxes given to the witness.)

16 A. Well, the colors are not exactly the same.
17 The disagradation, obviously, there is.

18 Q. You said the gradation is used by lots of
19 other products in the market; right?

20 A. Uh-huh (positive response.)

21 Q. None of your products use that; correct?

22 A. No. I was referring to the food market.

23 Q. I understand that's what you're referring to.
24 Now I'm asking you just to make sure.

25 None of your products until yellow SAME came

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1 sure?

2 THE COURT: Why don't you do that.

3 BY MS. SANCHEZ:

4 Q. You're saying to me that only thing that looks
5 similar between these two packages, which are Plaintiff
6 Exhibits 8 and 2, is the color yellow.

7 A. The yellow is not the same, although it is
8 yellow. The brands are different; the coffee is
9 different; the fruit bowl is different -- one has it,
10 the other one doesn't; one has orange juice.

11 Q. So because you're saying now that the colors
12 are not even the same, there is nothing similar between
13 these two packages. Is that your testimony?

14 A. It has similar elements like yellow. All the
15 other ones are different.

16 Q. Okay. So the fact that the SAME trade name
17 appears in blue lettering that goes slowly from light
18 blue to dark blue, that has nothing to do with the fact
19 that SPLENDA's letters go like that; right?

20 A. What we wanted to do was the logos that was
21 more modern. The current logo also has two colors, but
22 it's an old-fashioned logo.

23 Q. I understand you wanted to make a new one.
24 Your old one doesn't have gradation. It has two colors
25 that switch off back and forth. They are not gradated

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1 about, none of them used the gradated coloring;
2 correct?

3 A. No, that's right.

4 Q. And you didn't use the degrading coloring
5 from white, like in this blue SAME, to light blue, like
6 in your blue SAME; right?

7 A. Yes, white you wouldn't have seen it.

8 Q. You didn't use the white and blue coloring in
9 your blue SAME product, in your yellow SAME product.
10 Isn't that right? You didn't use the colors from your
11 blue SAME product in your yellow SAME product; right?

12 A. No, the colors are not the same, because one
13 has the blue background and the other one has the
14 yellow background. And one has to make them stand out.

15 Q. The fact that the yellow SAME product has a
16 white cloud around it, that has nothing to do with the
17 fact that SPLENDA has a white cloud around it --
18 correct-- it's just a coincidence?

19 A. The white cloud in SAME is something so that
20 the trademark stands out more. That's one of the
21 things that we wanted to make, for the SAME brand to be
22 read clearly.

23 Q. So you're saying it has nothing to do with the
24 fact that SPLENDA had a cloud; right?

25 A. No, it was to make the brand name more

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1 visible.

2 Q. The fact that your yellow SAME product has a
3 white coffee cup in the left-hand side in the exact
4 same spot shot at the exact same angle as the SPLENDA
5 box, that has nothing to do with SPLENDA -- right? --
6 that's just a coincidence?

7 A. The coffee cup shows on the lower right-hand
8 side because that's the most prominent side in the
9 packaging, and we wanted to use what stands out the
10 most, which would be the coffee cup, with the most
11 frequent usage.

12 Q. I'm showing you what's been marked as
13 Defendant Exhibit Y. You didn't use the orange coffee
14 cup from your EQUAL SWEET product; right?

15 A. Yes, that's right.

16 Q. And I'm showing you Defendant Exhibit AA. You
17 didn't use the large white coffee that's in your
18 CANDEREL product; right?

19 A. That's right.

20 Q. And you've been looking at the SUCARYL yellow
21 package, Defendant Exhibit CC, you didn't use that
22 coffee cup, did you?

23 A. In this photo, this is only a mock up. It's
24 not a real photograph.

25 Q. Well, it is a photograph. It's just not a

1 with SPLENDA; right?

2 A. The horizontal orientation has the advantage
3 of having more visibility on the shelf. And this one
4 also shares the same machinery that is used in
5 Argentina. The other ones are made in the United
6 States.

7 Q. So you are saying that there was no way you
8 could make your new yellow SAME product on the same
9 machines that make all three of your other products in
10 Puerto Rico.

11 A. No, because this one is cheaper to be made in
12 Argentina because it contains sugar.

13 In the United States there is a series of laws
14 that protect the sugar market that makes the United
15 States pay for sugar a lot more than other countries.

16 To make this product in the United States
17 would have cost us a lot more, and we would not have
18 had the volume positioning that we wanted.

19 Q. So it's your testimony that because of cost
20 you couldn't use any machinery that made these products
21 and had to use machinery that already existed in
22 Argentina; right?

23 A. That's right.

24 Q. Now, you were talking about how the horizontal
25 shape you can see better on the shelf. Do you remember

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1 real package; correct?

2 A. What you really normally use when you're doing
3 a draft for a design is that you use photographs that
4 are not defined as photographs. That's the kind of
5 photograph here. It's just to get a look and feel.
6 It's not something that you will be using in the final
7 photograph.

8 Q. In your yellow SAME package you didn't use a
9 white coffee cup with a silver rim around it, did you?

10 A. No.

11 Q. You didn't use the coffee cup that's on your
12 blue SAME?

13 A. No.

14 Q. And didn't you the coffee cup that was on your
15 NUTRASWEET product; right.

16 A. That's right.

17 Q. And you didn't place it in the center like you
18 do with the NUTRASWEET and SAME products; correct?

19 A. That's right. The coffee in SAME is more like
20 the coffee that is drunk in Puerto Rico. The others
21 are photographs of American coffee, which is normally
22 drunk in the United States.

23 Q. Now, the fact that the yellow SAME has
24 horizontal orientation, whereas all your other products
25 in Puerto Rico are vertical, that has nothing to do

1 that?

2 A. Yes.

3 Q. Let's talk about that a little bit more.
4 Do you agree that when you go into the store
5 what you see is the horizontal and the vertical parts
6 of the box; correct?

7 A. That's rights.

8 Q. You don't see the depth; right?

9 A. Yes. No, you don't see it.

10 Q. But the SAME box -- I'm looking at the 100
11 package, Plaintiff Exhibit 2 -- is much deeper than the
12 other ones; correct?

13 A. Yes.

14 Q. But the yellow SAME BOX, it doesn't weigh more
15 than the SPLENDA box; correct? The contents?

16 A. That's right. It's the same.

17 Q. And it doesn't weight more than the blue SAME
18 box; right?

19 A. That's right.

20 Q. So the hundred packets from the SAME box could
21 have fit in a SPLENDA size box or a blue SAME size box;
22 correct?

23 A. Yes, but that would have led us to have to
24 change the settings in the machinery that manipulates
25 the boxes, and that could have been more expensive.

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1 Q. But it could have been done; right?
 2 A. At a higher cost, yes.
 3 Q. So the reason why you made the SAME box bigger
 4 was because of machinery not because you needed a
 5 bigger box; right?

6 A. It's a question of cost and to make the
 7 packaging in the measurements that are used in
 8 Argentina where the packages are made.

9 Q. It wasn't to mislead consumers into thinking
 10 that perhaps they were getting more of the SAME than
 11 SPLENDA, was it?

12 A. Not at all. In addition to the depth, that's
 13 not something that people see a lot. It was a matter
 14 of cost.

15 Q. And it wasn't so you could say that the box is
 16 bigger, so it's not exactly the same as SPLENDA; right?

17 A. No, not at all.

18 Q. You talked a little bit about DOMINOS. I'd
 19 like to talk about that now.

20 A. Uh-huh.

21 Q. You will agree with me that in Puerto Rico
 22 private labels, the sales of private labels are much
 23 higher than the sale of DOMINO sugar; correct?

24 A. Yes.

25 Q. And that will be private labels such as

1 you're going through your business, you don't add the
 2 sugar sales to try and figure out what your share of
 3 the market is, do you?

4 A. Not in terms of every two months. But every
 5 year we compare ourselves with the volume of sugar
 6 sales to see how we are doing.

7 Q. When you testified earlier blue SAME had the
 8 highest volume on the market, you weren't including
 9 sugar in that SAME; right?

10 A. No, no.

11 Q. And you can get it out or I'll put it on the
 12 screen. You were shown Defendant Exhibit II, Puerto
 13 Rico in-market sales performance.

14 A. Yes.

15 Q. And on the second page it say's 'volume market
 16 shares by brands,' and there is no mention of sugar.
 17 Is that right?

18 A. It doesn't contain sugar.

19 Q. You testified that you worked for Merisant for
 20 seven years; right?

21 A. That's right.

22 Q. Was it always called Merisant?

23 A. No, it used to be Monsanto. But I worked
 24 managing these products.

25 Q. So for how long did you work for Monsanto?

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1 Plaintiff Exhibit 54 and 52, FLOR DE CANA and SNOW
 2 WHITE; correct?

3 A. Yes.

4 Q. And aside from DOMINOS, none of the brands of
 5 sugar in Puerto Rico use yellow; correct?

6 A. However, in sugar packets DOMINO is this main
 7 brand.

8 Q. But am I right that the other sugar brands
 9 doesn't use yellow?

10 A. Yes.

11 Q. And am I right that the sugar packets inside
 12 DOMINOS are not yellow?

13 A. Yes, they are white.

14 Q. You don't have any data that shows that
 15 consumers here in Puerto Rico or anywhere associate the
 16 color yellow with sugar, do you?

17 A. No, there is no data consumer. It's what you
 18 see on the shelf.

19 Q. In fact, sugar is not part of the your
 20 no-calorie market segment; right?

21 A. We see it as part of our market.

22 Q. I didn't ask you part of your market. I asked
 23 you if it was part of the market segment.

24 A. No, it's not part of our segment.

25 Q. And when you look at your market share when

1 A. Four years.

2 Q. And so you have worked for Merisant now for
 3 three years.

4 A. Yes, the three years that Merisant has been
 5 in.

6 Q. And Merisant bought the no-calorie sweetener
 7 products from Monsanto; is that right?

8 A. That's right.

9 Q. So Merisant is the successor in interest to
 10 Monsanto; right?

11 MR. LOCASCIO: Objection. Calls for a legal
 12 conclusion. Successor in interest. It sounds a little
 13 legal to me.

14 MS. SANCHEZ: I don't mean to call for a legal
 15 conclusion. I just want to know if it is the company
 16 that took over from the other company in all of its
 17 rights and obligations.

18 I'll rephrase.

19 BY MS. SANCHEZ:

20 Q. Did Merisant buy all of the no-calorie
 21 sweetener products that were previously owned by
 22 Monsanto?

23 A. Yes, he bought them all.

24 Q. How long have you been working with no-calorie
 25 sweeteners?

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1 A. Seven years.
 2 Q. And for those seven years you have been
 3 working in the markets in Latin America; correct?
 4 A. No. The Latin American market I started to
 5 see about two-and-a-half years ago.
 6 Q. Where did you work before that?
 7 A. In the Mexican market.
 8 Q. So for the seven-and-a-half years you've
 9 either worked in the Mexican market or the Latin
 10 American market; is that correct?
 11 A. Yes.
 12 Q. Is it fair to say your principal competitors
 13 have been saccharin products like SWEET'N LOW?
 14 A. I think at the global level, yes, but not in
 15 Latin America.
 16 Q. You've never worried about SUGAR TWIN in your
 17 business since you've been working at Merisant or
 18 Monsanto, have you?
 19 A. In Latin America, no.
 20 Q. In fact, in Puerto Rico you know that the
 21 share is something like point one percent; right?
 22 A. Yes, it's small.
 23 Q. And in fact, it's not carried in a lot of
 24 stores; right?
 25 A. That's right.

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1 Q. In fact, the pictures you took of Pueblo, they
 2 didn't carry SUGAR TWIN.
 3 A. Yes, probably. I didn't pay attention to that
 4 Pueblo.
 5 Q. Is it fair that before the lawsuit you never
 6 even heard of SUGAR TWIN?
 7 A. No, we look at the entire competition whether
 8 they sell a lot or a little.
 9 Q. You're not here to testify that when it comes
 10 to no-calorie sweeteners, consumers in Puerto Rico
 11 associate yellow packaging with SUGAR TWIN; are you?
 12 A. Puerto Rican consumers associate sugar with
 13 yellow, mainly because of SPLENDA, because of DOMINOS,
 14 and because of SUGAR TWIN.
 15 Q. Is it fair to say that SUGAR TWIN is unusual
 16 in that it contains saccharin but doesn't come in a red
 17 or a pink and white box, like SWEET'N LOW?
 18 A. We could say saccharin normally comes in pink.
 19 Q. Just like normally aspartame product come in
 20 blue; right?
 21 A. That's right.
 22 Q. Except for your new SAME product which comes
 23 in yellow but has aspartame; right?
 24 A. And contains sugar, that's right.
 25 Q. Let me go back to your SAME product that has

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1 'made with sugar' claim so that you could compete with
 2 SPLENDA's claim 'made from sugar, tastes like sugar'?
 3 A. Yes.
 4 Q. You saw an opportunity in the market to
 5 develop a product that would compete directly with
 6 SPLENDA; right? Isn't that what you said that direct?
 7 A. A product that is made with sugar at a good
 8 price, that's right.
 9 Q. That competes with SPLENDA; right?
 10 A. Mostly that is.
 11 Q. And you're promoting your new yellow SAME
 12 product to retailers telling them that you can get
 13 yellow SAME for less price than SPLENDA; right?
 14 A. The comparison that was made in the chart
 15 given to the sales people makes reference to SPLENDA,
 16 yes.
 17 Q. Well, you have that comparison in your own
 18 documents, don't you?
 19 A. Uh-huh (positive response.)
 20 Q. So the way that you've marketed this product,
 21 the way you talk about it in-house and market it
 22 outside is that you can get yellow SAME for less than
 23 SPLENDA, isn't right?
 24 A. Well, what we want to convey to everybody is
 25 that we have a product that has a closer relationship

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1 with sugar that is made with sugar and that clearly has
2 a very good price.

3 Q. A price that's lower than SPLENDA; right?

4 A. Yes, that's right.

5 Q. And, in fact, that's the reason why you've
6 made these packages so similar, so that they can
7 compete against each other; right?

8 A. Not necessarily. We use different elements to
9 reflect the usage in Puerto Rico; we use the yellow to
10 bring it closer to sugar; and we use our brand.

11 Q. You want consumers to believe that yellow SAME
12 is a similar product to SPLENDA.

13 A. No.

14 Q. But costs less. And that's why you put it in
15 a similar package. Isn't that right?

16 A. No. What we want --

17 Q. I think you've said what you want. I just
18 want to have an answer to my question. And Mr.
19 Locascio will give you the chance to talk more. Okay?

20 On your direct you pointed out that you
21 expected to get 60 percent of your sales of yellow SAME
22 from SPLENDA users; isn't that right?

23 A. Yes.

24 Q. And the idea behind the SAME product line, I
25 think you called it 'line extension,' is that you get

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1 Q. I'm sorry, sir. That's all I asked you was
2 whether it was the same product.

3 So if a consumer were to think yellow SAME is
4 the same product as SPLENDA, they would be confused,
5 wouldn't they?

6 A. It would be confused and mistaken.

7 Q. We talked a little bit ago about how Merisant
8 acquired Monsanto. Do you remember that?

9 A. Yes.

10 Q. And with the acquisition they got blue SAME
11 and they got EQUAL; right?

12 A. Together with other brands, yes.

13 Q. Now, you also said before that blue SAME
14 initially came on the market as a competitor to EQUAL;
15 right?

16 A. Yes.

17 Q. And that was in about '94?

18 A. I guess so, '94. About ten years ago. I
19 don't remember if it was '93 or '94, but yes.

20 Q. And when it first came on the market it was
21 made by somebody called "Venrod Corporation." Right?

22 A. It was a separate company from Monsanto and
23 Merisant, yes.

24 Q. And about two, two-and-a-half years after blue
25 SAME came on the market, EQUAL, Mersant's predecessor

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70 1 the same product from the same quality source at a
2 lower price. That's what blue SAME does: Right?

3 A. Not exactly. The positioning of SAME is that
4 you can obtain a quality product at a good price.

5 Q. But positioning is not that you can get a
6 similar particular product to EQUAL at a lower price.

7 A. The positioning that you have a product with a
8 good taste, a good price, and good value, let's say.

9 Q. Are you saying this product wasn't introduced
10 as a similar product to EQUAL but at a lower price?

11 A. It was introduced to compete against EQUAL
12 definitely, which at the time was the only sweetener in
13 Puerto Rico. When SAME was introduced here, EQUAL had
14 97 percent of the market.

15 Q. And it was marketed as is the same product as
16 EQUAL but at a lower price; correct?

17 A. Yes.

18 Q. But yellow SAME, that's not the SAME product
19 as SPLENDA but at a lower price; correct?

20 A. No, but what we want to do with SAME with
21 sugar is show that it's a value product and tie it in
22 with sugar.

23 Q. But it's not the same product as SPLENDA at a
24 lower price; correct?

25 A. It's not the same as SPLENDA.

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1 sued the SAME makers; right?

2 A. I wouldn't know because I wasn't involved in
3 the Puerto Rico market, so I wouldn't know.

4 Q. Well, let me show you a market that we have
5 marked as Plaintiff Exhibit 69.

6 (Exhibit handed to the witness.)

7 This is a complaint filed by -- you see the
8 Monsanto Company was the plaintiffs; correct?

9 A. Uh-huh.

10 Q. And Merisant bought again the products from
11 this company, Monsanto; right?

12 A. Yes.

13 Q. And if you'll turn to page 7, I'm just going
14 to go through some of these with you and see if you
15 knew about them.

16 (Publishing.)

17 "Recently Venrod and Nutribest began a
18 deceptive comparative advertising campaign against
19 EQUAL, claiming that SAME contains a NUTRIENDULZADOR as
20 an ingredient, and further misrepresenting to the
21 public and the trade that EQUAL and SAME, except for
22 the price, are identical products, when in fact they
23 are not."

24 Do you see that?

25 A. Yes.

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1 Q. And, in fact, you know when SAME came on the
 2 market that's exactly what they did. They said they
 3 were the same but cost less; correct?
 4 A. Uh-huh. Okay.

5 MR. LOCASCIO: Objection. It lacks
 6 foundation. He says he wasn't here at the time, if she
 7 wants to ask if he knows that.

8 MS. SANCHEZ: I would say it's not relevant
 9 whether he was there at the time, because the whole
 10 complaint is an admission on Merisant's admission. And
 11 he should be able to be questioned about it as the
 12 representative from Merisant.

13 MR. LOCASCIO: She was asking if that's what
 14 it says in this document. That's fine. I'm not sure
 15 if that's the best use of her time. But other than
 16 that, he said he doesn't know about it.

17 MS. SANCHEZ: May I continue?

18 THE COURT: Yes.

19 BY MS. SANCHEZ:

20 Q. If you flip over to page 8, Merisant in this
 21 lawsuit against the initial makers of SAME allege that
 22 "The use by the Defendants of SAME in combination with
 23 a trade dress that mimics EQUAL's trade dress, backed
 24 with a deceitful advertising campaign that claims that
 25 SAME contains a NUTRIENDULZADOR, followed by claims

1 A. That's right.

2 Q. And it doesn't capitalize on any of the
 3 goodwill that SPLENDA has worked so hard to create;
 4 correct?

5 A. No way at all.

6 Q. You are aware that after several years of
 7 litigation Mersant's predecessor Monsanto eventually
 8 bought the SAME brand from the Venrod Corporation;
 9 right?

10 A. That's right.

11 Q. That's how Merisant eventually got it;
 12 correct?

13 A. Uh-huh (positive response.)

14 Q. Now, Mr. Locascio asked you some questions
 15 about the testimony you heard from Ms. Fontes. Do you
 16 remember that?

17 A. Yes.

18 Q. And you were here when she testified, I think
 19 you said.

20 A. That's right.

21 Q. So heard her say she might have been mistaken
 22 and might have bought the yellow SAME product in a
 23 Grande market; right?

24 A. That's right.

25 Q. And you're not here to tell the Court that

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1 that SAME is identical to EQUAL, are clearly designed
 2 to capitalize on the immense fame and public
 3 recognition of EQUAL and NUTRASWEET."

4 Do you see that?

5 A. Yes, I see it.

6 Q. And were you aware that when this lawsuit was
 7 filed Merisant's predecessor was upset with the fact
 8 that the blue SAME used the trade dress that was
 9 similar to it?

10 A. That's what it says there, yes.

11 Q. And that they were upset because the blue SAME
 12 was trying to capitalize on the goodwill of EQUAL.

13 A. Yes, that's what it's says there.

14 Q. Which had been in market for at least over ten
 15 years at that point; correct?

16 A. At that time ten or 15 years.

17 Q. And by that time EQUAL had spent a lot of
 18 money advertising its brand; correct?

19 A. Yes.

20 Q. It worked really hard to get consumers to
 21 recognize its blue box with the big strawberry; right?

22 A. Yes.

23 Q. But using this yellow SAME brand, that doesn't
 24 mimic the trade dress of this SPLENDA product. That's
 25 your testimony; right?

1 it's impossible that she could have bought the yellow
 2 SAME product in the Grande supermarket; right?

3 A. Not in Grande.

4 Q. It would have been possible to buy the yellow
 5 SAME product in the Grande Supermarket, I think it was
 6 in San Francisco, she said.

7 A. In Grande, no, it's not impossible.

8 Q. I'd like to just show you a couple of exhibits
 9 that Mr. Locascio went over with you. If you could
 10 pull out Exhibit W, or you can look at the screen if
 11 you prefer.

12 A. Yes.

13 Q. You have a section here called "Marketing
 14 Strategy SAME with sugar." And it says, "Position SAME
 15 with sugar directly against other products that claim
 16 to be made from sugar."

17 A. Yes.

18 Q. In actuality there is only one product that
 19 claims to be made from sugar. Isn't that right?

20 A. Yes, there is a major player, which is SPLENDA
 21 and SUGAR TWIN.

22 Q. SUGAR TWIN doesn't claim to be made with
 23 sugar, does it?

24 A. No, but it has the name SUGAR TWIN in the
 25 name.

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1 Q. But it's not made with sugar; right?
 2 A. Not that one.
 3 Q. And as you have here "made with sugar" in
 4 quotations, there is no claim on here that says 'made
 5 with sugar.'
 6 A. No, there is not.
 7 Q. In fact, your next paragraph is "brand
 8 positioning." New SAME with sugar is not made from
 9 sugar. You have that in italics. And that's the SAME
 10 wording that's on the SPLENDA box; right?
 11 A. Uh-huh (positive response.)
 12 Q. And then you have 'ours is made with sugar' in
 13 capital letters and italics; right?
 14 A. Yes.
 15 Q. At the bottom here you have a statement,
 16 "marketing budget." And it says, "We believe the
 17 success with SAME with sugar launch will require
 18 investment of approximately 200,000."
 19 Is that an accurate statement?
 20 A. Yes, for television, yes.
 21 Q. And for trade activities you say -- or whoever
 22 wrote this says -- the trade budget is about 58,000.
 23 Is that correct?
 24 A. That's right.
 25 Q. In your direct testimony you talked a little

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1 bit about how you would be hurt if you had to take this
 2 product off the market. Do you remember that?
 3 A. Yes, of course.
 4 Q. Let me ask you: Is SAME sold anywhere in your
 5 Latin America territory?
 6 A. No.
 7 Q. Neither brand, yellow or blue?
 8 A. Regular SAME is sold in some markets, like
 9 Peru, Ecuador, and some in the Caribbean. But SAME
 10 with sugar, no.
 11 Q. So it's your testimony that you couldn't sell
 12 the yellow SAME boxes that you have printed out for
 13 Puerto Rico in one of those other countries that sells
 14 the blue SAME.
 15 A. Well, yes, we could sell it.
 16 Q. You also gave testimony about how your -- I
 17 may be using the wrong word -- your retailers would be
 18 fined. Do you remember that?
 19 A. Yes. The store Grande, Pueblo.
 20 Q. But you're not saying it would be fined if the
 21 Court ordered that the product be taken off the market,
 22 are you?
 23 A. That, I don't know how it works.
 24 Q. And you're not saying that even if they were
 25 fined, Merisant could just pay them back the fine.

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1 Isn't that correct?
 2 A. Yes, of course.
 3 Q. After all, it wasn't their fault that you came
 4 up with in package; correct?
 5 A. Yes, of course, and that it would increase our
 6 costs.
 7 MS. SANCHEZ: Can I have a minute, Your Honor?
 8 THE COURT: Yes.
 9 BY MS. SANCHEZ:
 10 Q. Just a couple of more questions.
 11 A. Yes of course.
 12 Q. I forgot to ask you. You keep referring to
 13 this as "SAME with sugar." Isn't that correct?
 14 A. That's right.
 15 Q. But that's not the name you chose to put on
 16 the box. It doesn't say 'SAME with sugar.' Right?
 17 A. That's right. We just put SAME.
 18 Q. Just like the blue SAME. It's just SAME.
 19 A. That's right.
 20 MS. SANCHEZ: Can I have Exhibit 70?
 21 BY MS. SANCHEZ:
 22 Q. I'd like to show you what's been previously
 23 marked as Plaintiff Exhibit 70, and it's the legal
 24 brief that was submitted in the same case with the
 25 complaint that I just showed you a little while ago.

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1 A. Uh-huh.
 2 Q. I want to show you what Merisant's predecessor
 3 said in this brief.
 4 MR. LOCASCIO: Your Honor, again I object. He
 5 said he wasn't involved at the time and doesn't know
 6 anything about this legal pleading. And they want to
 7 show him?
 8 And I also question the representation as to
 9 the successor of Monsanto. I don't know that anybody
 10 in the room has the combination to explain the nature
 11 of the Merisant/Monsanto relationship; but's certainly
 12 not in the acquisition of Monsanto. That much I know.
 13 MS. SANCHEZ: The witness has testified that
 14 Merisant bought both EQUAL and SAME, which this lawsuit
 15 is about, from Monsanto. So the statements in here
 16 made by Monsanto can a attributed to the ones made by
 17 Merisant as an admission.
 18 But in any case, all I'm going to do is point
 19 him to some statements that have been made here and ask
 20 him whether he agrees with them. I think that they
 21 will not pass over into Mr. Locascio's objection. And
 22 perhaps he can wait until I ask the question and then
 23 see if it's objectionable.
 24 THE COURT: Okay.
 25 BY MS. SANCHEZ:

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1 Q. On page 7 of the brief Monsanto attorney
 2 wrote: "In the instant case there is no doubt that
 3 defendants have adopted and used in commerce a
 4 trademark identical in meaning to EQUAL, and in a
 5 package whose design mimics EQUAL's trade dress and
 6 design, and the consuming public is bound to be
 7 confused by similarity of defendant's SAME trademark."
 8

9 That's pretty much what McNeil is alleging
 here; isn't that correct?

10 A. You're asking me?

11 Q. Yes.

12 A. I don't know the legal terms that you're
 13 using, but I suppose that that's the spirit.

14 Q. I'll break it up and make it easier.

15 You know that McNeil is suing Merisant here
 16 because it claims it's adopted and is using -- selling
 17 using in commerce -- it's SPLENDA trade dress on its
 18 yellow SAME.

19 You know that that's one of the claims here;
 20 right?

21 A. Yes.

22 Q. And you know that McNeil is saying, "You've
 23 copied most of the elements of the SPLENDA trade dress
 24 in your yellow SAME." That's what we are saying;
 25 right?

1 with its blue SAME package.

2 A. I don't know what the people at SAME wanted to
 3 do at that moment. But what I can tell you is that
 4 what we wanted to do was to provide to the market a
 5 product with good value tied in with sugar.

6 MS. SANCHEZ: No further questions.

7 MR. LOCASCIO: I have only two or three.

8 THE COURT: Two or three questions.

9 MR. LOCASCIO: I didn't say "questions." I
 10 was thinking areas of questions; I'll try to get it to
 11 questions, Your Honor.

12 THE COURT: That's okay.

13 REDIRECT EXAMINATION

14 BY MR. LOCASCIO:

15 Q. Are you aware that the District Court of
 16 Puerto Rico denied Monsanto's request for a preliminary
 17 injunction against SAME in the case Ms. Sanchez was
 18 just referring to?

19 A. I didn't know, but I imagined it.

20 Q. Did you imagine that because SAME continued to
 21 sell a product in a blue package?

22 A. Yes, the SAME design that they had at the
 23 time.

24 Q. In the entire time you have been involved with
 25 SAME with sugar since it's been released to the trade,

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1 A. That's what you're saying, yes.

2 Q. And we've also said that the consuming public
 3 is going to be confused by the similarity between the
 4 two trade dresses; right?

5 A. That's one of the things that you're saying,
 6 yes.

7 Q. And the way that Merisant or Monsanto resolved
 8 this lawsuit is it bought SAME from its previous
 9 makers, Venrod; right?

10 MR. LOCASCIO: Objection. Lacks foundation
 11 and it's also mischaracterization.

12 MS. SANCHEZ: I believe he already testified
 13 to it. I'm just going over it again.

14 THE COURT: I believe he testified that they
 15 did buy the SAME; but I don't think he testified that
 16 it was in the context of this lawsuit.

17 BY MS. SANCHEZ:

18 Q. Well, do you know the reason why -- well --
 19 THE COURT: Or as a result of.

20 Q. Do you know that as a result of this lawsuit
 21 that's why Monsanto bought the SAME brand?

22 A. No, I don't know.

23 Q. Okay. You do agree that what you're doing
 24 with your yellow SAME package to SPLENDA is the SAME
 25 thing that the Venrod Corporation was doing to Monsanto

1 are you aware of anyone in the trade reporting any
 2 instances of confusion in the marketplace?

3 A. No, I haven't received that.

4 Q. In that time are you aware at Merisant -- have
 5 you received any calls from consumers saying, 'I bought
 6 your product; I meant to buy someone else's. I'm
 7 confused.'?

8 A. No.

9 Q. Have you received any comments from the
 10 grocery stores here in Puerto Rico that says, 'This
 11 product looks too much like SPLENDA. I'm confused.'?

12 A. No.

13 MR. LOCASCIO: No other questions, Your Honor.

14 MS. SANCHEZ: I just have one other question.

15 RECROSS-EXAMINATION

16 BY MS. SANCHEZ:

17 Q. You testified.

18 MS. SANCHEZ: Well, not one other question.
 19 One other subject.

20 Q. You testified that blue SAME came on the
 21 market in '93/'94.

22 A. Yes.

23 Q. Are you aware that the complaint that the
 24 EQUAL filed against SAME happened more than two years
 25 later?

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1 A. No.
 2 MS. SANCHEZ: Thank you.
 3 MR. LOCASCIO: No further questions.
 4 THE COURT: Let me ask you a question.
 5 Do you see the DOMINO box is there?
 6 THE WITNESS: Yes.
 7 THE COURT: That's deep yellow.
 8 THE WITNESS: That's right.
 9 THE COURT: And the box of SUGAR TWIN is also
 10 deep yellow?
 11 THE WITNESS: That's right.
 12 THE COURT: Okay. Would you say this box of
 13 SAME is deep yellow?
 14 THE WITNESS: No.
 15 THE COURT: Would you say that this box of
 16 SPLENDA is deep yellow?
 17 THE WITNESS: No, it's more yellow than SAME,
 18 but it's not -- excuse me -- it's not the same as a
 19 deep yellow.
 20 THE COURT: Okay.
 21 Any more questions?
 22 MS. SANCHEZ: No, Your Honor.
 23 MR. LOCASCIO: No, Your Honor.
 24 THE COURT: You're excused.
 25 Well, I guess we'll get to oral arguments in

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1 the morning; no?
 2 MR. LOCASCIO: If it's fine with you. If
 3 that's your schedule. Whatever you would like us to
 4 do.
 5 The only point of the housekeeping we've got
 6 is -- I'll raise this with the plaintiffs. We may have
 7 some logistical issues getting it done. But I believe
 8 the survey questionnaires -- the 800 over here and the
 9 300 on the other side -- that are relied upon by the
 10 survey experts, I would like to have those put into the
 11 record as well, Your Honor, because we've got people
 12 testifying about what surveys say and what the basis
 13 is.
 14 To have a complete record, I think those
 15 should come in. I have no problem with their's coming
 16 in and obviously think mine should come in.
 17 And if there are questions about whether they
 18 were reviewed properly -- not that the Court needs to
 19 engage in that sort of exercise, but at least they will
 20 be on the record, and then should this go beyond what
 21 the people who are alleged confused or allegedly
 22 ascribed secondary meaning to, those surveys are
 23 actually there.
 24 In some of the other cases the Court looks
 25 through what Survey 106 said, for instance.

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1 MR. ZALESIN: Your Honor, I've tried many,
 2 many cases involving surveys, as I said the other day,
 3 and most of them have been advertising cases, not
 4 trademark cases. But I've never seen a case in which
 5 all of the survey questionnaires were admitted into
 6 evidence.

7 There are approximately two large boxes of
 8 survey questionnaires in the defendant's survey and at
 9 least one to one-and-a-half large boxes of
 10 questionnaires in the case of the plaintiff's survey.

11 These questionnaires haven't been
 12 authenticated. That is to say, a witness hasn't said
 13 before Your Honor, 'These are questionnaires that I
 14 used in my survey. I've been through these and these
 15 are them.' So it's a question, I think, if we just
 16 dump them into evidence as to their authenticity.

17 Nevertheless, if Your Honor would rather have
 18 them in the record, I certainly don't object to it. I
 19 would simply say that it's unusual and I don't think at
 20 this point there is an evidentiary foundation.

21 There is one other problem, and I'm concerned
 22 about the timing. You may recall that the
 23 questionnaires that were part of the defendant's survey
 24 were originally prepared in both English and Spanish.
 25 So if you go through those questions that are stapled

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1 together in every instance, an English version and a
 2 Spanish version, they are easy to read in either
 3 language. And I don't believe that any translation
 4 would be required, if my understanding of the rules are
 5 correct.

6 On the other hand, the questionnaires in the
 7 Plaintiff's survey were taken only in Spanish. There
 8 are no English translations of those individual
 9 documents. They have been summarized and tabulated,
 10 and that testimony and those summaries are all in
 11 English. But the individual questionnaires, which we
 12 never intended to put in evidence as individual
 13 documents, are only in Spanish.

14 It obviously would take us some time to
 15 translate all of those. Nevertheless, we are willing
 16 to do it. I am simply concerned about losing time and
 17 slowing the process down and cluttering up the record
 18 with something that's probably not going to be of much
 19 utility to the Court.

20 With those caveats, I leave it up to Your
 21 Honor.

22 MR. LOCASCIO: Just to reference the other
 23 sweetener case, indeed, Cumberland v Monsanto blue and
 24 pink, actually in that opinion the Court does go
 25 through some surveys. So, obviously, the pool of

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1 surveys were available in the evidence in that case.

2 And to the extent it's a logistics issue, I
3 know we had somebody go through all of their surveys
4 and create a translation. And we would be happy to
5 turn that over to whoever wants it turned over, if it's
6 a court translator or to the other side, if that would
7 make the process any easier.

8 MR. ZALESIN: Just to clarify. I didn't say
9 that it doesn't happen frequently that several exemplar
10 questionnaires or particular questionnaires that a
11 litigant wants to call the Court's attention to are
12 placed in evidence.

13 And the usual procedure for that is when
14 there is a witness on the witness stand, 'Mr. so and
15 so, let me hand you the following five questionnaires.'
16 They are identified, they are placed in evidence, and
17 the witness is questioned about it; and there is no
18 issue as to their authenticity, and these are the
19 particular questions that belong in the record.

20 I have never seen the entirety of two or, in
21 this case, four large boxes of questionnaires placed in
22 the evidence. But, again, having said everything I've
23 said before, it's entirely up to Your Honor.

24 MR. LOCASCIO: I'll add to that we've already
25 got a nice binder set for the Court. We're not just

1 It's grouped as he likes it to be grouped.
2 But the data he is aggregating for the Court is in
3 those surveys.

4 MS. ZALESIN: Your Honor, the way to handle
5 that in the course of the hearing would have been to
6 challenge Professor Mazis when he was here with
7 particular questionnaires that Mr. Locascio thought
8 that they were incorrectly tabulated or incorrectly
9 grouped.

10 The way to do that is, 'Professor Mazis, here
11 is questionnaire No. 203. You counted this as a
12 yellow. It really should have been out because of the
13 shape of the box; isn't that right?'

14 And then that's in evidence.

15 But to simply put them all in, and now I
16 suppose we are going to have argument after the fact
17 about any one of these thousand of -- literally there
18 are thousands of these questionnaires. There are 800
19 of theirs and 300 of ours.

20 To have argument of over a thousand different
21 questionnaires is something I've never seen, and I
22 think really is improper.

23 THE COURT: What's the way it was done in that
24 other case?

25 MR. LOCASCIO: The other case the Court looked

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1 going to 'dump them in.'

2 THE COURT: Well, yes, but the questions are
3 pretty well standard questions that the experts here
4 testified about.

5 Why would you want the individual questions to
6 go onto evidence?

7 MR. LOCASCIO: It's the responses to those
8 questionnaires.

9 THE COURT: But those responses are also the
10 subject of expert testimony with percentages, which is
11 what is actually relevant.

12 MR. LOCASCIO: I'll point Your Honor's
13 attention to the Cumberland case where that Court said,
14 "We need to look at what these people said." And
15 that's when the Eastern District of New York City
16 looked at the surveys and said in some instances that
17 the expert said, "these are counted in my category."

18 I'm not saying the Court needs to do this,
19 except they are in evidence, we can then identify those
20 or the Court could rely on those, or if it goes up, as
21 to what were the bases, in this case, Dr. Mazis's
22 testimony, who was in which category.

23 Because I don't think the evidence they put in
24 on that in terms of what underlies his survey covers
25 the answers to those questions.

1 at --

2 THE COURT: Because there was an issue with
3 respect to specific questionnaires, and the expert
4 witness was confronted with those questionnaires; no?

5 MR. LOCASCIO: No, it's not clear on the
6 record that that's what happened, Your Honor.

7 THE COURT: I mean, they came into the
8 forefront because there was specific information in
9 those questionnaires that the Court had to look at,
10 because they noticed an either contradictory or not
11 supporting what the expert witness's testimony.

12 MR. LOCASCIO: It's not an issue in the
13 Monsanto/Cumberland case of the Court looking and
14 pointing out.

15 The Court goes back through in that case and
16 says, 'This is what was in the way plaintiff counted
17 the survey. And looking at these responses, some have
18 nothing to do with the trade dress issue in this case;
19 and others do.'

20 So the Court discounted some of them and
21 relied on the others to look at the numbers that were
22 presented.

23 It's not an issue from the opinion, at least
24 as raised on cross, 'These six were shown the
25 witnesses.'

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1 These are the survey responses in evidence,
 2 and of the 50 that are allegedly counted as this, only
 3 20 should have been; and, thus, we are not going to
 4 rely on that expert's report.

5 The only other thing I would say is to the
 6 extent I should have been crossing Dr. Mazis on the 300
 7 surveys that he told me he never saw most of them, I
 8 don't know that that would have been, A, the most
 9 efficient use of the time we had here, but, B,
 10 particularly fruitful.

11 THE COURT: I still fail to get the issues.
 12 Why is it so important to have the original questions
 13 and answers into evidence?

14 MR. LOCASCIO: Your Honor, if you don't think
 15 that's necessary and you think just the data
 16 compilations are enough for both sides, those can be in
 17 to the extent I think there are some underlying issues
 18 as to how it was calculated on the plaintiff's side as
 19 to what's put in what group.

20 THE COURT: He testified as to that.

21 MR. LOCASCIO: So the calculations, the
 22 summary totals, will be in the record; but the boxes or
 23 the binders of the surveys will not?

24 THE COURT: I don't see any necessity for
 25 that.

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1 survey. And we have no objection to these going into
 2 the record.

3 With that, I believe both sides have presented
 4 all the proof we have for Your Honor. And I look
 5 forward to the opportunity to summarize it all for you
 6 in the morning.

7 THE COURT: Tomorrow at 9:30 then?

8 MR. ZALESIN: Very well. Thank you.

9 THE COURT: Then I'll give you dates later for
 10 the simultaneous submission of any additional briefs or
 11 proposed findings for each side.

12 MR. LOCASCIO: Thank you.

13 MR. ZALESIN: Thank you.

14 (The taking of the hearing was
 15 concluded.)

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1 MR. LOCASCIO: Okay.

2 THE COURT: We'll just go by the tabulations
 3 and the statistics represented by the experts. Okay?

4 MS. LOCASCIO: Can we look at the exhibit list
 5 to see if there is anything else we need to put in?

6 THE COURT: Yes.

7 (Discussion off the record.)

8 MR. ZALESIN: Two small items to complete the
 9 record, Your Honor. First of all, with respect to the
 10 plaintiff's evidence, Dr. Mazis was questioned about
 11 his report which was turned over to Merisant in draft
 12 form on Tuesday, February 24th, and then in final
 13 signed form Wednesday, February 25th.

14 You may recall Professor Mazis testifying that
 15 he forgot to take the word "interim" off the cover at
 16 that time.

17 That report is not part of the record. The
 18 parties would like it to be.

19 MR. LOCASCIO: No objection.

20 MR. ZALESIN: So we would like to add that to
 21 the record.

22 And the other thing is with respect to the
 23 defendant's evidence. There is an exhibit that's been
 24 pre-marked as Exhibit RR. They are the complete
 25 tabulations of all of the data from the defendant's

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REPORTER'S CERTIFICATE

I, JOYCE DEL VALLE, Official Court Reporter; DO HEREBY CERTIFY that the foregoing transcript is a full, true and correct record of the testimony that was taken down by me by machine shorthand and thereafter transcribed by means of computer aided transcription method.

I FURTHER CERTIFY that I am in no way interested in the outcome of the case mentioned in said caption.

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Official Court Reporter

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